KARUPPANNAN CHELLAPPAN

v.

CHONG LEE CHIN

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[CIVIL SUIT NO: 22-165-96]
10 AUGUST 2000

CONTRACT: *Sale and purchase of land - Breach - Non-disclosure of condition imposed by local authority on property - Whether purchaser entitled to damages and/or rescission of sale & purchase agreement - Whether maxim caveat emptor applicable*

CONTRACT: *Misrepresentation - Fraudulent misrepresentation - Non-disclosure of condition imposed by local authority on property purchased - Whether words "… free from all encumbrances …" in sale & purchase agreement tantamounts to fraudulent misrepresentation - Whether words thereof only apply to encumbrances that restrain transfer of title to purchaser*

LIMITATION: *Fraud - Action based on fraud - Computation of time - Discovery of fraud - Whether within six-year limitation period - Limitation Act 1953, s. 29*

The plaintiff claimed, *inter alia*, for damages for breach of a sale and purchase agreement ('the SPA') and alternatively a rescission thereof. The plaintiff claimed that the defendant misled him by fraudulently representing that the property purchased from the defendant ('the property') was free from all encumbrances. That was because he had no knowledge of the condition imposed by the local authority that the window protrusions that protruded into the air space of the neighbouring land should be removed upon development of the said land. As a consequence thereof, the owner of the neighbouring land sued him for trespass wherein he was ordered to pay RM225,000 to the said owner in removing them.

The issues were: (i) whether the defendant was obliged to inform the plaintiff of the condition imposed by the local authority; (ii) whether the words "…free from all encumbrances …" in the SPA tantamounts to fraudulent misrepresentation in view of the non-disclosure thereof; and (iii) whether the plaintiff's action was time-barred.

Held:

[1] There is no fiduciary relationship between a vendor and purchaser. Thus, an uncommunicative or taciturn vendor could not be faulted if he failed to disclose any patent defect such as the window protrusions found in the instant case.

[2] The plaintiff chose not to enquire about the window protrusions, which to the discerning purchaser would show that they had trespassed into the adjacent land. The maxim *caveat emptor* requires that the buyer be cautious as the risk is his and not that of the seller. That maxim applied to the plaintiff.

[3] The phrase "… free from all encumbrances…" in the SPA could not be interpreted to extend to the condition on the protrusions and could not be said to be a misrepresentation that had induced the plaintiff into purchasing the property. The said words must be read and taken together with the words "… and with vacant possession…" for its true meaning and intent. Viewed in that manner, they could only be interpreted as encumbrances that restrain a transfer of title under the NLC.

[4] The plaintiff failed to discharge his burden of proof that the defendant was indifferent or reckless in making the alleged fraudulent statement in the SPA. The plaintiff also failed to prove, on a balance of probabilities, that the defendant had an intention to induce.

[5] This facts indicate that the plaintiff knew of the window protrusions in 1989. As such, time had begun to run from 1989 to the date of filing this suit on 20 September 1996. It was clear, therefore, that the plaintiff was time barred. The defence of limitation must, on the facts, succeed.

[Claim dismissed.]

Case(s) referred to:

Ang Hiok Seng v. Yim Yur Kio [1997] 1 CLJ 497 ***(refd)***
Derry v. Peek [1880] AC 14 ***(refd)***
Holmes v. Jones [1907] 4 CLR 1702 ***(refd)***
Karuppannan v. Balakrishnan [1994] 3 MLJ 585 ***(refd)***
Mewah Plus P Property SB v. Kluang District Government Servants Co-Operative Housing Society Ltd [2000] 2 CLJ 236 ***(refd)***
Turner v. Green [1895] 2 Ch 205 ***(refd)***
United Motor Finance v. Addison & Co [1937] 1 All ER 425 ***(refd)***
Wei Tah Construction Co SB v. Law Wun Ing [1981] 2 MLJ 159 ***(refd)***
Yandle & Sons v. Sutton [1922] 2 Ch 199 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 17, 18
Evidence Act 1950, s. 114(g)
Limitation Act 1953, ss. 6, 29

Other source(s) referred to:
Halsbury's Law of England, 4th edn, Reissue paras 758, 1122
Mozley & Whiteley's Law Dictionary
The Sale and Purchase of Real Property in Malaysia, commentary by Prof Visu Sinnadurai

For the plaintiff - Jagdeep Singh Deo (Simon Murali with him); M/s Karpal Singh & Co
For the defendant - Nathan (Faizul Hilmy Ahmad Zamri with him); M/s WY Chan & Roy

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Embong J:

The plaintiff is the owner and registered proprietor of Hotel Sentosa, a four storey building which stood on Lot 26, Brincang, Cameron Highlands. He had bought that four storey building (the said building) previously built as a shophouse from the defendant, the previous registered owner of Lot 26 under a sale and purchase agreement (SPA) dated 20 January 1984. Planning permission to build the said building was obtained by the defendant from the then local authority, *ie*, the Lembaga Bandaran Cameron Highlands (LBCH) in May 1978. Pursuant to the defendant's appeal to LBCH (see p. 14) the authority had allowed the defendant, for aesthetic value, to construct windows protruding into the airspace of the neighbouring land, *ie*, Lot 25, on the condition that the protrusions would have to be removed at the defendant's own cost when planning permission is given to the owner of Lot 25 to develop that land. The certificate of fitness for the said building was approved by the authority on 21 December 1978 (see p. 13) but was issued only on 19 April 1984, *ie*, after the said building had been sold to the plaintiff. The plaintiff became the registered proprietor to Lot 26 on 9 May 1984.

Sometime in 1990, the owner of the neighbouring Lot 25, one Balakrishnan, decided to build a hotel on his land. The plaintiff, pursuant to the Federal Court order in an action where Balakrishnan had sued the plaintiff for trespass, was ordered to remove the window protrusions and pay expenses amounting to RM225,000 incurred by Balakrishnan in removing the said protrusions. (see Federal Court decision in *Karuppannan v. Balakrishnan* [1994] 3 MLJ 585, now referred to as the earlier suit.)

In that case, the plaintiff had disputed that he was under an obligation to remove at his expense, the window protrusions. The Federal Court held that the protrusions had trespassed into Lot 25's airspace and that the plaintiff, as owner of the said building, was liable for the trespass.

The plaintiff in this action, now says that he had no knowledge of the condition laid down by LBCH on the removal of the window protrusions. He alleged that the defendant had misled him by fraudulent misrepresentation in not divulging on this condition and had expressed that fraudulent misrepresentation in the SPA by stating that it was free of any encumbrance. He further said that had he known of that condition he would certainly had not purchased the said building from the defendant. It was not in dispute that the condition on the removal of the window protrusions was not a restriction or condition that appeared on the title of Lot 26. The plaintiff further stated that he only became aware of this condition during the trial of the earlier suit – sometime in 1992. The plaintiff now seeks for the following reliefs (as per the amended statement of claim – see k. 30):

1. Damages for RM553,299 being special damages he had to pay to Balakrishnan to remove the window protrusions and for estimated cost of renovations and also loss of income in his hotel business and for travelling expenses, alternatively,
2. Rescission of the SPA and the return of the original purchase price.
3. General damages.
4. Interest and costs.

The plaintiff is a Brincang resident of over 45 years and at the time when the said building on Lot 26 was constructed, had a restaurant business in the vicinity of and adjacent to Lot 26. He personally saw the construction of the said building and had intimated his interest to purchase it from the defendant. When he purchased the said building, it was completely built together with the window protrusions. He did not however engage the services of a surveyor nor conduct a search with the LBCH to enquire into the said building. He said that since it was a new building he had assumed that everything was in order and that there was no flaw in it. In 1989, the owner of Lot 25, *ie*, Balakrishnan had discussed with him to have the window protrusions removed. Balakrishnan had then put up a signboard on his Lot 25, announcing that a hotel would be constructed on his land.

In her defence, the defendant said that the plaintiff had seen the said building and was satisfied with its construction prior to the purchase. She said that the plaintiff never asked her about the window protrusions. She also said that

she had already forgotten about the condition imposed by the LBCH on the need to remove the window protrusions whenever the owner of Lot 25 wished to build thereon. She denied that she had deliberately withheld the information on the condition from the plaintiff.

It is not in dispute that the plaintiff was not informed of the condition imposed by the LBCH in respect of the protruding windows. The questions posed here is whether the defendant was obliged to inform the plaintiff of the existence of this condition. The next question is to determine whether the statement in cl. 1 of the SPA stating that the said building was sold "free from all encumbrances" tantamounts to a fraudulent misrepresentation by the defendant in view of the defendant's non-disclosure of the condition.

Non-Disclosure Of The Condition

As regards the first question, the uncontradicted evidence shows that the plaintiff had seen and inspected the said building in its final state, prior to the purchase. He had made no enquiries from the defendant and that the defendant had not remembered the condition imposed when planning permission was given by LBCH in 1978. The court finds the explanation given by the defendant that she had forgotten about the condition on the window protrusions given some six years before the parties signed the SPA on 28 July 1984, as reasonable. The said condition was contained in a letter dated from the LBCH to Mr. Toh Lee Toon the architect or surveyor acting for the defendant in the construction of the said building. The defendant, from my observation was honest enough to say that she could also not recall if Mr. Toh Lee Toon was an architect or a surveyor. Such memory lapses on a matter of detail is not uncommon of the ordinary person. A past fact is often forgotten by a witness. Learned counsel for the defendant had submitted that the window protrusions are, if at all a defect, a patent defect of quality and cited *Yandle & Sons v. Sutton* [1922] 2 Ch 199 which defined a patent defect as one which must either be visible to the eye or arise by necessary implication from something visible to the eye. Yusof Mohamed J in *Wei Tah Construction Co SB v. Law Wun Ing* [1981] 2 MLJ 159, when dismissing the plaintiff's claim to avoid a contract on the grounds of mistake or non-disclosure of material facts had this to say of patent defects of quality:

> ... Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of the purchaser and to quote Halsbury's Laws of England 3rd Ed. Vol. 34 page 212:
>
> > the rule is caveat emptor; a purchaser should make inspection and inquiry as to that which he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards

> on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition; and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection.

> It is very obvious in the present case that the plaintiff had chosen not to inspect the land before executing the transfer with the 1st defendant in view of his other considerations in making a quick profit and in this regard he cannot now complain on discovering the defects after his venture with Mr. Siew has failed.

The learned judge also quoted Griffith CJ in *Holmes v. Jones* [1907] 4 CLR 1702 who said:

> It appears to me to be common sense as well as law that when a purchaser chooses to rely upon his own judgment of upon that of his agent, he cannot afterwards say that he relied upon a previous representation made by the vendor.

The proposition in law is that there is no fiduciary relationship between a vendor and purchaser. (See *Turner v. Green* [1895] 2 Ch 205). Thus, an uncommunicative or taciturn vendor cannot be faulted if he failed to disclose any patent defect such as the window protrusions found in the instant case. Now, the evidence disclosed the following facts.

The plaintiff was interested in purchasing the said building right from the very start. The building was constructed right under the plaintiff's own nose, so to speak. He saw its birth, its growth and its completion. The plaintiff is a local and had a restaurant business only a stone's throw away. He had intended to turn the building into a hotel and restaurant business. He saw, viewed and must be inferred to have inspected the said building prior to purchasing it. He must have seen the window protrusions during his inspection, although he had foolishly failed to make the necessary enquiries or searches from the local authorities but instead relied on instinct thinking that there would be no problem with a new building. But he was purchasing a four storey building, not a bunch of bananas. Even in the purchase of the latter, the maxim *caveat emptor* would apply. The plaintiff was a businessman, not a simpleton (as also observed by the Federal Court in *Karuppannan v. Balakrishnan*, the earlier suit). Yet he failed to employ the services of a surveyor to determine the boundary of the said building. He knew that the said building stood next to an empty lot. As a local he must have foreseen that there would be future development in Brincang and the likelihood that the adjacent empty lot would also be developed. He could easily have his solicitor to enquire from the local authority on the future plan of the adjacent vacant lot, but failed to do so. He, however, chose not to enquire about the window protrusions, which to

the discerning purchaser would show that they had trespassed into the adjacent land. The maxim *caveat emptor* requires that the buyer be cautious as the risk is his and not that of the seller. In the case as to the sale of goods the seller is usually not bound to answer as to the soundness of the article sold. (See *Mozley & Whiteley's Law Dictionary* on the definition of 'caveat emptor'). Similarly, *caveat emptor*, in my view, applies to the plaintiff here.

An ordinary precaution undertaken by a prudent purchaser of real property is to make a survey and if he omitted to take this precaution he does so at his own risk. (see commentary by Prof. Visu Sinnadurai in *The Sale and Purchase of Real Property in Malaysia*). The commentary in *Barnsley's Conveyancing Law and Practice* states –

> A purchaser of an existing house will need to check that no unauthorised extensions or alterations have been made to it.

The Federal Court in the earlier suit also came to the same conclusion on the plaintiff's knowledge and had said (at p. 591):

> Now, to say that the appellant/defendant has no knowledge of the protrusions, we somehow find it difficult to accept such a statement. His address, as can be seen from the issue document of title at the time of transfer of Lot 26 to himself, is No 20, New Town Brinchang, Cameron Highlands and so he is very much a local resident. We can assume that he has been negotiating for the purchase of the land and building even before the completion of the building itself since the date of the issue of the certificate of fitness for occupation coincided with the date of final payment of the purchase price of the building. Needless to say that Brincang is a small town and one can take judicial notice of the fact that most of the residents of the town know one another and also know the kind of development that takes place from time to time. In the case before us, the appellant/defendant is a local resident and is a purchaser of a four-storey hotel building. With confidence, we say he cannot be a simpleton. He must have visited the land and the building. He must therefore know the boundaries of his land and his counsel even now admits that he now knows where the boundaries are. We are sure not just now. He has known of them for some time at the very least. Being one who is not a simpleton, he must have noticed and very likely he must also have enquired of the protrusions.

Fraudulent Misrepresentation

Coming next to the related second question of whether there had been a misrepresentation by the defendant in the inclusion of the phrase "free from all encumbrances" into the SPA. In his submission learned counsel for the plaintiff relied on a passage in the earlier suit where the Federal Court at p. 590 stated –

> The word 'encumbrances' does not merely consist of conditions or restrictions in interest that normally appear on a document of title to land. It encompasses any matter concerning the land or its owner when any such matter, for example, fetters the right of the owner to deal with his land or to enjoy his land in a normal way. Such encumbrance, which does not appear on a document of title, may take the form of some gazetted intention for compulsory acquisition of land, or the presentation of a winding-up petition against a corporate owner of the land.

Learned counsel contended that the condition imposed by the LBCH on the protruding windows had interfered with the right of the registered proprietor to enjoy his property in the normal way, and as such, although not capable of being endorsed in the title, remains an encumbrance. It was thus contended that since the defendant knew of the encumbrance there was a clear cut case of fraudulent misrepresentation when it was stated in the SPA that the said building was free of all encumbrances. It was further contended that no reasonable minded purchaser would agree to buy the said building if he knew of the condition to have the window protrusions removed at a future date. Sections 17 and 18 of the Contracts Act 1950 define fraud and misrepresentation respectively as follows:

> 17. "Fraud"
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> "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
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> (a) ...
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;
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> 18. "Misrepresentation"
>
> "Misrepresentation" includes –
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> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) ...
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Learned plaintiff's counsel correctly pointed out to the court that the standard of proof needed of the plaintiff to prove the existence of the fraudulent misrepresentation is one on a balance of probabilities. I am guided here by the Federal Court decision in *Ang Hiok Seng v. Yim Yur Kio* [1997] 1 CLJ 497 at pp. 517-518 where Mohd. Azmi FCJ said:

> From the wide definition of "fraud" under Section 17 of the Contracts Act 1950 as well as on the leading authorities on the subject, where allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities.
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> ... But where the allegation of fraud is entirely founded as a civil fraud - and not based on a criminal conduct or offence - the civil burden is applicable.
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> ... The definition of "fraud" read in conjunction with the authorities, leads us to the conclusion that where fraud alleged in civil proceedings is based on a criminal offence, the criminal burden of proof beyond reasonable doubt must be applied.

The contention that the plaintiff would not have purchased the said building if he knew of the existence of the condition may be dealt with first. I find this to be totally unacceptable. The plaintiff had all along been interested in purchasing the said building to convert it into a hotel, which he later did and to date, the hotel business is still in operation. The evidence shows that he had been eyeing the said building right from the inception of its construction. It is not difficult to see the reason in this. The plaintiff was a restauranter in Brincang. A hotel and restaurant business could be safely inferred as synergistic to and an obvious expansion to his restaurant business. Furthermore as stated by the plaintiff himself, there were not too many hotels in Cameron Highlands in 1984. In short, a hotel business would be good and profitable and that reason can be seen in his keenness to purchase the said building and start a hotel and restaurant business. If he had then known of the condition attached to the window protrusions would he have given up this desire to start up the hotel business? I think not. At worst, the purchase price of RM400,000 paid for the said building would be re-negotiated. Thus, to now say, that he would not have purchased it, with that added information on the condition, is unbelievable and must be rejected as a mere afterthought. More so, as the plaintiff now says that there are now so many new hotels in Cameron Highlands and his profit from the hotel business is small. It appears that his earlier enthusiasm is now smothered by bad times.

The Encumbrance In The SPA

In submitting that the condition imposed for the removal of the window protrusions is an encumbrance envisaged by the SPA, learned counsel for the plaintiff relied on a passage of the Federal Court's judgment in the earlier suit, adverted to above. Learned counsel contended that the said condition has the characteristic of an encumbrance. With respect, I think that this argument had misapplied the above-quoted passage.

The passage cited was a remark made only by way of passing, an *obiter dictum* which do not form part of the *ratio decidendi* of the earlier case. The Federal Court was not, it must be emphasised, making that statement in the context of interpreting the word "encumbrance" appearing in the SPA. The Federal Court was merely expanding on the conditions and restrictions in interest that may be endorsed onto a land title under the National Land Code (NLC) when it ruled on whether the condition in question (referred to as an undertaking in the earlier suit) was one that may be traced in the land office, in answer to appellant's (plaintiff here) counsel's suggestion that such condition could be so traced. After outlining what implied conditions may be imposed on a document of land title the Federal Court concluded that:

> None of the implied conditions the character of which comes anywhere close to the undertaking in our case.

Back to this case, the court's task here is to determine whether the disputed phrase found in the SPA amounts to a fraudulent misrepresentation. In my judgment, it would be incorrect to merely take the word "encumbrance" singularly and peg this to the passage cited from the earlier suit and conclude that that word is all encompassing, to "all matters that might fetter the right of a land owner to enjoy his land in the normal way".

It is now necessary to reproduce the alleged phrase of fraudulent misrepresentation in full to get a clear picture as to its meaning. It says:

> ... the Vendor will sell and the Purchaser will purchase the property **free from all encumbrances and with vacant possession**." (emphasis added)

This phrase emphasised above is not strange and invariably appears in most sale and purchase agreements for land or property. Conveyancing practice in fact demands for the inclusion of such a or similar phrase to guarantee that purchasers will take a good clean title in the property purchased free from any encumbrances. The encumbrance meant is one within the context of the NLC, one that can be registered and endorsed in a document of title.

The phrase is meant as an undertaking on the part of the vendor that the purchaser will take a good title on the said building upon full payment of the purchase price. Thus the reference to the encumbrance in the SPA must be confined to a matter that can affect the passing of title. The last five words in that phrase underscore the position.

There is no dispute here that the title of the said building was registered into the name of the plaintiff. Lot 26 was in fact free of encumbrances at the time of execution of the SPA and the transfer of title.

The Court of Appeal's case of *Mewah Plus P Property SB v. Kluang District Government Servants Co-Operative Housing Society Ltd* [2000] 2 AMR 1462 was cited by the defence to support a narrow interpretation of the word "encumbrance". In that case, the plaintiff/appellant entered into a sale and purchase agreement (the agreement) to purchase the defendant/respondent's property (the property). Clause 9 of the agreement provided that the respondents as vendors should remove all encumbrances over the said property, and cl. 10 provided that in the event the respondents failed to remove the said encumbrances, the agreement would be considered terminated and the respondents would have to return the deposit and pay damages. Upon the execution of the agreement, the appellant paid 10% of the purchase price as deposit and was given the power of attorney to enable the appellant to enter the said property. Upon entering the property, the appellant discovered that the neighbouring landowner had encroached onto the said property (the encroachment).

Clauses 9 and 10 read as follows:

> The Vendor/s shall secure the removal of all encumbrances (if any) and the discharge of all existing charge/s from the existing chargee/s described in s. 13 of the schedule hereto and or other charge/s (if any) at his/their own expense and costs over the said property through his/their solicitors on or before the Date of Completion and the Vendor/s hereby authorises his solicitors and/or the purchaser/s solicitors to utilise such part as shall be required from the purchase price paid by the purchaser/s as redemption money for discharging the said charge/s over the said property. The redemption sum paid shall be treated as and deemed to be payment towards account of the purchase price.
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> In the event that the vendor/s fail/s and or neglect/s to remove the said encumbrances or if after the Date of Completion the Memorandum of Transfer cannot be registered in favour of the Purchaser/s and or his/their nominee/s or assign/s free from encumbrances for any reason whatsoever the Vendor/s shall at the request of the Purchaser/s and/or his/their nominee/s or assign/s forthwith refund and return all sums accepted and received by the Vendor/s towards the purchase price together with the further sum stated in Section 12 of the schedule hereto as liquidated damages whereupon this agreement shall be treated as

terminated but without prejudice to the right of the Purhaser/s and or his/their nominee/s or assign/s to take steps to remove such encumbrances and to be reimbursed in respect of the expenses reasonably incurred by him/them.

It was the appellant's argument that the encroachment was an encumbrance under both the abovestated clauses. The Court of Appeal disagreed giving its rationale in a passage now reproduced:

> With due respect to counsel for the appellant, we are unable to agree with his argument. In our judgment, the word "encumbrances" in the two clauses already quoted refers to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. As was pointed out to counsel during argument, "encumbrances" in the context of the agreement in question means an encumbrance in the National Land Code sense. As to what amounts to an encumbrance in the context of the National Land Code, reference may be usefully made to two decisions of the Privy Council on the point.
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> The first is *Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267, where Lord Diplock when delivering the advice of the board said (at p 269):
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> > In the National Land Code it is s. 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in and, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of *Eng Mee Yong & Ors v. V Letchumanan* [1979] 2 MLJ 212, to which reference may conveniently be made.
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> The second is *Letchumanan Chettiar v. Palaniappa Chettiar* [1983] 1 MLJ 6, where (at p 9) Lord Templeman referred to a caveat upon the register as "the only relevant encumbrance", thereby rendering a wider meaning to that expression than that given it by Lord Diplock in *Damodaran v Choe Kuan Him (ibid)*.

> The encroachment relied upon by the appellant in the present instance is not an encumbrance envisaged by the parties in the sale and purchase agreement. It follows that the parties when making their agreement did not make any provision for an encroachment on the said property.

As such, it is my finding that the phrase "free from encumbrances" in the SPA could not be interpreted to extend to the condition on the protrusions and cannot be said to be a misrepresentation that had induced the plaintiff into purchasing the said building. The words "free from encumbrances" in the SPA must be read and taken together with the words "and with vacant possession" for its true meaning and intent, and when viewed in that manner can only be interpreted as encumbrances that could restrain a transfer of title under the general scheme of the NLC.

I also find that the plaintiff had failed to discharge his burden of proof that the defendant had been indifferent or reckless in making the alleged fraudulent statement in the SPA. I am also satisfied that the defendant was not wrong in her understanding of the word "encumbrances" as one in the context of an NLC registrable encumbrance and not embracing the condition imposed on the window protrusions. To hold on to such a belief was, in the circumstances, reasonable. The question whether a false representation was actually fraudulent is, in every case a question of fact. (see *Halsbury*, 4th edn, Reissue, para 758). Besides proving that the defendant had made the fraudulent misrepresentation, the plaintiff need also satisfy the court, on a balance of probability, that the defendant had an intention to induce. (see *United Motor Finance v. Addison & Co* [1937] 1 All ER 425). The defendant thus needs to establish both the result and object of the representation. This, in my finding, he had failed to do.

Over a century ago, the Privy Council, in that classic case *Derry v. Peek* [1880] AC 14 @ 374 laid down the following proposition, which I now quote and keep to:

> First in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.

I also do not accept as sufficient proof when the plaintiff stated that he would not have purchased the said building had he known of the condition on the protrusions. I had earlier found this excuse to be a mere afterthought by the plaintiff.

The same test remains applicable here as our statutory definition of fraud under s. 17 Contracts Act 1950 (above) includes the qualification "with intent to deceive another party".

Time Bar

The defence had submitted that even if fraud had been established, the plaintiff's action was time barred under s. 29 of the Limitation Act 1953, which says:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
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> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
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> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) ...
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be or could with reasonable diligence have discovered it:

The plaintiff had submitted that he only found out about the window protrusions upon the filing of the earlier suit on 21 September 1990. Thus, when this present action was filed on 20 September 1996, he was to the day, within the six-year time limit. The defence argued that, at the latest, the plaintiff became aware of the condition in July 1989 when the owner of the adjacent Lot 25 informed him about his intention to develop his land. As such, when this instant suit was filed on 20 September 1996, the plaintiff had been statutorily time barred. The SPA was executed on 20 January 1984. Over 12 years had elapsed when this action was filed on 20 September 1996. If this action was one under a contract *per se*, the plaintiff was clearly time barred under s. 6 of the Limitation Act 1953 which allows such actions only before the expiration of six years. However, fraud had been pleaded, and as such the limitation period of six years is postponed to a date running from the moment the plaintiff had discovered the fraud or could with reasonable diligence have discovered it. The plaintiff in his own testimony had actually admitted that sometime in 1989 Balakrishnan (*ie*, the plaintiff in the earlier suit) had met him to discuss the latter's request to remove the window protrusions but the discussion did not produce any result. The plaintiff also must have known that Balakrishnan was building a hotel on the adjacent Lot 25 since the latter had put up a signboard for public information of his proposal to develop his land. The plaintiff also stated that he had received a letter from Balakrishnan asking him to demolish the protrusions, sometime in 1989 or 1990 and that after receiving

that letter to which the plaintiff had refused to comply, the plaintiff went into preparation to defend the earlier suit. The plaintiff however failed to produce that letter and the court had invoked s. 114(g) Evidence Act 1950 against him and had presumed that the letter was sent to him in 1989. The plaintiff also admitted that he took photographs of the window protrusions in 1989, in preparation for his defence in the earlier suit. These facts incontrovertibly established that the plaintiff became aware of the disputed window protrusions sometime in 1989. Needless to say he could have, with reasonable diligence, also discovered the alleged fraud by the defendant, ie, the non-disclosure or concealment of the condition on the window protrusions, if he had exercised some prudent enquiries in preparing for his defence in the earlier suit. It should also be mentioned that the defendant here was made a third party in the earlier suit. The plaintiff must be inferred therefore, to have investigated into the alleged concealed fraud. He had after all also pleaded fraud against the defendant in the earlier suit (see GS 22-227-1990)

As for requirement to exercise reasonable diligence, I also find that the plaintiff had failed to show that he had conducted such enquiries to discover the real facts when Balakrishnan required him to remove the window protrusions back in 1989. I find support in so concluding from the following passage of *Halsbury's Law of England* (4th edn, Reissue para, 1122):

> In order to prove that a person might have discovered a fraud, deliberate concealment or mistake with reasonable diligence at a particular time, it is not, it seems, sufficient to show that he might have discovered the fraud by pursuing an inquiry in some collateral matter; it must be shown that there has been something to put him on inquiry in respect of the matter itself and that if inquiry had been made it would have led to the discovery of the real facts.

Thus, in my view, time had begun to run from 1989 and calculated to the date of filing this suit, on 20 September 1996, it was clear that the plaintiff was time barred. I would therefore hold that the defence of limitation must, on the facts, succeed.

For the above reasons, the plaintiff's claim is dismissed with costs.